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Supreme Court, U.S.
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No. 93-988

In The

Supreme Court of the United States

October Term, 1993

CLAIR W. BURKE,

Petitioner,

v.

DEERE & COMPANY, a/k/a JOHN DEERE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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36 pp

QUESTION PRESENTED

SHOULD THIS COURT GRANT CERTIORARI TO REVIEW THE COURT OF APPEALS' ORDER DENYING PETITIONER'S MOTION TO DISMISS APPEAL WHEN THE ORDER IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS, THE QUESTIONS PRESENTED BY PETITIONER ASSUME FACTS THAT DO NOT APPLY TO THIS CASE AND MEET NONE OF THE CRITERIA FOR REVIEW BY THE SUPREME COURT ON CERTIORARI, THE COURT OF APPEALS DID NOT SET FORTH THE REASONS FOR ITS ORDER, AND THE ORDER IS UNREPORTED AND OF NO PRECEDENTIAL VALUE?

PARTIES TO THE PROCEEDINGS

Respondent Deere & Company, a/k/a John Deere Company is publicly owned. It owns no subsidiaries that are not wholly owned.

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BRIEF IN OPPOSITION

Respondent Deere & Company ("Deere") respectfully opposes the Petition for Writ of Certiorari ("Petition") to review the order denying Petitioner's motion to dismiss appeal entered by the United States Court of Appeals for the Eighth Circuit in the above-captioned case on August 4, 1992.

OPINIONS BELOW

The Court of Appeals' order denying Petitioner's motion to dismiss appeal, of which review is sought, is unreported and is included in Petitioner's Appendix at

p. 1a. The Court of Appeals' order denying reconsideration and Petitioner's suggestion for reconsideration en banc is included in Petitioner's Appendix at p. 16. The Court of Appeals' decision on the merits is reported at 6 F.3d 497 (8th Cir. 1993), and is included in the Appendix at pp. 3a-44a. The Court of Appeals' order denying rehearing and Petitioner's suggestion for rehearing en banc is included in the Appendix at p. 45a. The District Court decision on Deere's motions for judgment notwithstanding the verdict and for new trial is reported at 780 F.Supp. 1225 (S.D. Iowa 1991).

JURISDICTION

Jurisdiction in the District Court was based upon 28 U.S.C. § 1332(a)(1) and jurisdiction in the Court of Appeals was based upon 28 U.S.C. § 1291. The initial decision of the Court of Appeals reversing the judgment against Deere was entered on August 13, 1993. On August 26, 1993 Petitioner served a petition for rehearing with suggestion for rehearing en banc. On August 27, 1993 the initial decision was vacated and a substituted decision entered. The petition for rehearing and suggestion for rehearing en banc were denied on September 22, 1993. The Petition For Writ of Certiorari was filed in this Court on December 21, 1993. It seeks review not of the decision on the merits but only of the August 4, 1992 Court of Appeals' order denying Petitioner's motion to dismiss the appeal on the ground that Deere's second notice of appeal was not timely filed.

PROVISIONS OF STATUTES AND RULES INVOLVED

See Petition for Writ of Certiorari, at pages 2-3.

In addition, Rule of Civil Procedure 60(b) provides in pertinent part:

> On motion . . . the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence . . . or (6) any other reason justifying relief from the operation of the judgment.

Supreme Court Rule 10.1 provides in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Supreme Court Rule 13.4 provides in pertinent part:

> The time for filing a petition for a writ of certiorari runs from the date of the judgment or decision sought to be reviewed is rendered . . . However, if a petition for rehearing is timely filed . . . the time for filing . . . runs from the date of the denial of the petition for rehearing or the date of a subsequent judgment.

STATEMENT OF THE CASE

1. Facts Pertinent to Petition.

The Statement and Introduction of the Case at pp. 3-7 of the Petition, and the Reasons for Granting Certiorari at pp. 8-11 of the Petition, misstate relevant facts, omit to include other relevant facts, and assert as facts matters

for which there is no support and which are not true. The following are the undisputed facts pertinent to the questions presented by the Petition:

1. The initial Judgment in this case was entered on November 26, 1990. On December 7, 1990 Deere filed timely motions for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b), for new trial under Fed. R. Civ. P. 59(a), and to alter or amend the judgment under Fed. R. Civ. P. 59(e). Deere's motions for judgment notwithstanding the verdict and new trial were denied by the District Court on December 4, 1991, on the condition that Petitioner accept a remittitur of the punitive damages from $50 million to $28 million. Petitioner consented to the remittitur on December 23, 1991.

2. Even though its timely Rule 59(e) motion to alter or amend the judgment had not yet been ruled upon, on December 31, 1991 Deere filed a precautionary Notice of Appeal, stating therein that it believed the Notice of Appeal was premature and that it recognized a new notice of appeal may be required after ruling on the pending Rule 59(e) motion. On January 13, 1992 the Clerk of the Court of Appeals acknowledged by letter that Notice of Appeal was premature and the appeal was not docketed.

3. On January 9, 1992, the District Court entered an Order on Deere's pending Rule 59(e) motion to alter or amend the November 26, 1990 Judgment. An Amended Judgment was entered by the Clerk of Court on January 9, 1992.

4. On January 17, 1992 Petitioner filed his "Plaintiff's Motion to Amend Amended Judgment of January 9,

1992," in which he moved "pursuant to Federal Rule of Civil Procedure 59(e)", to amend the Amended Judgment: (1) to grant him punitive damages of $28 million rather than $7 million and (2) to specify November 26, 1990 (rather than the date of the Amended Judgment) as the time from which post-judgment interest was to run and (3) to specify the rate of post-judgment interest.

5. On February 18, 1992 the District Court entered an Order on Petitioner's January 17, 1992 Rule 59(e) motion to amend the Amended Judgment stating, inter alia, that post-judgment interest should be calculated as if the judgment entry of January 9, 1992 were entered November 26, 1990. However, the District Court concluded its Order by giving specific instructions to the Clerk of Court regarding amendment of the January 9, 1992 Amended Judgment as follows:

> THEREFORE IT IS ORDERED that the plaintiff's motion to alter and amend the judgment pursuant to Fed.R.Civ.P. 59(e) is granted. The third paragraph of the January 9, 1992, judgment is stricken and the following placed in lieu thereof: IT IS FURTHER ORDERED that judgment is rendered against the defendant in the amount of $28,000,000 in punitive damages. Of this amount, $7,000,000, plus reasonable attorney's fees and costs, are awarded to the plaintiff. The remaining balance is to be held in an interest bearing account by the Clerk of this Court until further order of this court.

This specific order to the Clerk of Court regarding entry of judgment did not include *any* award of interest on the punitive damages. In addition, it contained no instruction to the Clerk of Court regarding interest on the award of compensatory damages.

6. On the same date, February 18, 1992, the Clerk of Court entered a Second Amended Judgment. It provided that:

> IT IS ORDERED AND ADJUDGED that judgment is rendered in favor of the Plaintiff, Clair W. Burke, for $390,000.00 actual damages plus interest at 10% from and after September 15, 1986, until date of this order, and interest thereafter at the rate as provided by law pursuant to 28 U.S.C. § 1961.
>
> IT IS FURTHER ORDERED that judgment is rendered against the Defendant in the amount of $28,000,000 in punitive damages. Of this amount, $7,000,000, plus reasonable attorney's fees and costs, are awarded to the Plaintiff. The remaining balance is to be held in an interest bearing account by the Clerk of this Court until further order of this court.

This Second Amended Judgment is *exactly* as ordered by the District Court in its Order of February 18, 1992.

7. On February 28, 1992, within 10 days after entry of the Second Amended Judgment, Petitioner filed his "Plaintiff's Motion to Amend Second Amended Judgment of February 18, 1992" ("February 28 Motion to Amend Judgment"), in which he again moved the court *"pursuant to Federal Rule of Civil Procedure 59(e)"* to specify (1) the date from which post-judgment interest is to accrue, and (2) the rate of post-judgment interest.

8. On April 1, 1992 the District Court entered an Order which states in part that: "Plaintiff's third *motion to alter or amend the judgment* brings this matter before the court. After *careful consideration* the court *grants* the

motion." (emphasis added). It then ordered that the "current judgment entry in this case [the Second Amended Judgment] is *vacated* pursuant to Federal Rule of Civil Procedure *59(e)*. The Clerk of Court shall enter a *new judgment* as follows: . . . ". (emphasis and brackets added). Thereafter the District Court set out exactly how the new judgment should read:

> IT IS ORDERED AND ADJUDGED that judgment is rendered in favor of the Plaintiff, Clair W. Burke, for $390,000 actual damages plus interest at 10% per annum from September 15, 1986, until *November 26, 1990*, and interest thereafter at the rate *in effect November 26, 1990*, as provided by law pursuant to 28 U.S.C. section 1961.
>
> IT IS FURTHER ORDERED that judgment is rendered against the Defendant in the amount of $28,000,000 in punitive damages *plus interest from November 26, 1990, at the rate in effect November 26, 1990, as provided by law pursuant to 28 U.S.C. section 1961*. Of this amount $7,000,000, plus reasonable attorney's fees and costs, *and post-judgment interest thereon*, are awarded to the Plaintiff. The remaining balance is to be held in an interest bearing account by the Clerk of this Court until further order of this court.
>
> IT IS FURTHER ORDERED that judgment be rendered in favor of the Plaintiff for costs in this action of $9,422.00, *to be entered as of November 26, 1990. All other requests for additional costs are denied.*

(emphasis added to show difference between Second Amended Judgment and Third Amended Judgment).

9. On the same date, April 1, 1992, the Clerk of Court entered a Third Amended Judgment, exactly in the form ordered by the District Court. Contrary to the assertion by Petitioner on p. 6 of the Petition, the clerk did not enter the Third Amended Judgment to "correct the error arising from its prior omission of the November 26, 1990 post-judgment interest date". The Clerk of Court did so on specific order from the District Court utilizing the language of the District Court, *exactly* as ordered by the District Court.

10. Deere filed a Notice of Appeal on April 28, 1992, within 30 days after entry of the District Court's April 1, 1992 ruling on Petitioner's Rule 59(e) February 28 Motion to Amend Judgment, and within 30 days after entry of the Third Amended Judgment on April 1, 1992.

11. Petitioner filed his Appellee's Motion to Dismiss Appeal in the Court of Appeals on July 20, 1993. After resistance by Deere and the filing of briefs thereon by both Petitioner and Deere, the Court of Appeals entered the following one-sentence order on August 4, 1992: "Appellee's motion to dismiss the appeal has been considered by the Court and is hereby denied." Petitioner's Appendix, p. 1a.

12. Petitioner's motion for reconsideration of the denial of his motion to dismiss or alternatively for reconsideration en banc were denied by the Court of Appeals by order on September 15, 1992 which stated:

> Appellee's suggestion for reconsideration en banc of the order of August 4, 1992 is denied. Appellee's motion for reconsideration is also denied.

Petitioner's Appendix. p. 2a. Under the rules of the Court of Appeals the suggestion for reconsideration en banc would have been circulated to the full court. The order denying reconsideration en banc does not indicate any dissent therefrom. Thus, apparently none of the eleven judges on the Court of Appeals voted to reconsider denial of the motion to dismiss appeal.

13. On August 13, 1993 the Court of Appeals filed a decision on the merits reversing the judgment against Deere in its entirety and remanding for new trial on the claim for compensatory damages only. On August 27, 1993 the Court of Appeals vacated its initial decision and a substituted decision was filed. It likewise reversed the judgment in its entirety and remanded for new trial on the claim for compensatory damages only.

14. On August 26, 1993, before the August 13, 1993 decision was vacated and the August 27, 1993 decision substituted therefor, Petitioner served a motion to reconsider the August 13, 1993 decision, and a suggestion for rehearing en banc. After the substituted decision was filed Petitioner filed a Supplemental Statement in Support of Appellee's Petition For Rehearing and Suggestion For Rehearing En Banc, but he did not file a motion to reconsider the August 27, 1993 decision of the Court of Appeals.

15. On September 22, 1993 the Court of Appeals filed an order as follows:

> The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc.
>
> The petition for rehearing is also denied.

Petitioner's Appendix, p. 45a.

16. Petitioner filed his Petition for a Writ of Certiorari in this Court on December 21, 1993.

2. Inaccurate Statements in the Petition.

Petitioner's Statement and Introduction of the Case, and Reasons for Granting the Petition, are inaccurate and misleading in several particulars. For example, at p. 5 the Petition states that when entering the Second Amended Judgment on February 18, 1992, "the court clerk erroneously omitted the November 26, 1990 date set forth in the district court's order as the date from which post-judgment interest was to run." To the contrary, the Clerk of Court did not "erroneously omit" anything. The February 18, 1992 Order of the District Court precisely directed the Clerk of Court to enter a specific judgment, setting it out verbatim, and leaving no discretion with the Clerk of Court about the language thereof. The Clerk entered the judgment exactly as ordered by the court, omitting nothing therefrom.

At p. 6 of the Petition, the Petitioner states that the Clerk of Court entered the Third Amended Judgment on April 1, 1992 "[t]o correct the error arising from its prior omission of the November 26, 1990 post-judgment interest date . . . ." This false and misleading statement implies a motive to the Clerk of Court's entry of the Third Amended Judgment which the Clerk of Court never had. The facts are that the April 1, 1993 Order precisely directed the Clerk of Court to enter a specific judgment, setting it out verbatim, and the Clerk of Court did exactly

as ordered. It is simply not true that the Clerk of Court "erroneously omitted" anything in the Second Amended Judgment, or that the Third Amended Judgment was entered by the Clerk "to correct the error arising from its prior omission" of any date from the Second Amended Judgment.

Likewise, Petitioner's February 28 Motion to Amend was not, as Petitioner asserts on p. 9 of the Petition, "in substance a motion seeking to correct the court clerk's oversight resulting in the clerk's Rule 58 judgment not reflecting the district court's February 18, 1992 order." Again, the Clerk of Court entered the Second Amended Judgment and the Third Amended Judgment in the *exact* words specifically ordered by the District Court in its February 18, 1992 and April 1, 1992 Orders. The following assertions on page 10 of the Petition are equally false and misleading:

> "In reducing the district court's order to a judgment pursuant to Rule 58, the court clerk mistakenly omitted the November 26 date from which interest was to run. That clerical mistake was the subject matter of Burke's February 28, 1992 motion."

If the Clerk of Court had in fact made a mistake, or had in fact entered the judgment erroneously, rather than exactly as ordered by the District Court, or had in fact erroneously omitted from the judgment something that the District Court ordered included, Petitioner's argument that his February 28, 1992 Motion to Amend Judgment was in substance a Rule 60(a) motion would be enhanced. But repetition of untruths will not make them come true.

The facts remain unchanged that the Clerk of Court followed the District Court's orders precisely, and made no "mistake", "error" or "omission" in entering the Second Amended Judgment. Petitioner's repeated misstatement of those simple and undisputed facts, and his repeated false and conclusory representations that the facts are otherwise, illustrate the lengths to which he is willing to distort the facts in order to induce this Court to grant his Petition.

It is also not true as stated at p. 6 of the Petition that only difference between the Second Amended Judgment and Third Amended Judgment "is the insertion of the November 26, 1990 date", nor is it true that the Third Amended Judgment did not in any way change the District Court's prior disposition of the merits or any other issues raised in the case. The Second Amended Judgment, entered pursuant to the District Court's February 18, 1992 Order, did not award *any* interest on the punitive damage award, let alone state when any interest on the punitive damages would begin to run, and had not awarded post-judgment interest on the compensatory damages to begin many months before the date of the judgment. The Third Amended Judgment materially revised the Second Amended Judgment. It added not only the date upon which post-judgment interest on compensatory damages would begin to run (a date many months before the date of the Third Amended Judgment), but it also (i) added interest on punitive damages, (ii) set the rate thereof, and most significantly, (iii) awarded interest on the punitive damage award from November 26, 1990, a date about 16 months before the date of the judgment. This interest on the $28 million punitive damage award, for the period

from November 26, 1990 to the date of the Third Amended Judgment, at the 7.28% rate for judgments entered on November 26, 1990, resulted in an increase in the amount of the judgment by in excess of $2.7 million.

Petitioner's attempt at page 10 of the Petition to support his argument that his February 28 Motion to Amend Judgment was a Rule 60(a) motion to correct a clerical mistake, by attributing knowledge, purpose and motive to Deere's lack of opposition to the motion, is contrived, without any factual support, and wrong. There is simply no evidence that Deere did not oppose Petitioner's motion to amend the judgment "because" the motion did not ask the court to reconsider matters previously decided, or "because" it concerned nothing other than a "clerical mistake", or concerned only the clerk's ministerial duty to reduce the court's order to judgment. Petitioner would have this Court believe that notwithstanding that within thirty days after the ruling on its motion for judgment n.o.v. or for new trial (but when its motion to alter or amend the judgment had not been ruled upon) Deere filed a precautionary Notice of Appeal which recited that Deere was aware it needed to file a new notice of appeal after the ruling on its Rule 59(e) motion to alter or amend the judgment, and with knowledge that Petitioner's February 28, 1992 motion to amend the Second Amended Judgment was in substance a Rule 60(a) motion which would not toll the time for appeal, rather than a Rule 59(e) motion which would toll the time for appeal, Deere knowingly failed to file a timely notice of appeal from the Second Amended Judgment. That is absurd, and there is nothing except Petitioner's wildest dreams that would support such a notion. The issues

raised by Petitioner's February 28 Motion to Amend Judgment had already been briefed in response to Petitioner's January 17, 1992 Motion to Amend Judgment. There was no purpose to filing another resistance. That the issues had been earlier raised and not decided to Petitioner's satisfaction does not mean that Petitioner's February 28 Motion to Amend Judgment was "in substance a Rule 60(a) motion" rather than a Rule 59(e) motion to alter or amend as he called it when he filed it and as the District Court labeled it when it ruled upon it.[1]

Petitioner's description of the underlying products liability case in the Factual Background portion of the Petition (pp. 3-4) is conclusory and perjoritave and is not supported by the facts as found by the Court of Appeals and reported at 6 F.3d 497. That decision is, however, not at issue on this Petition.

REASONS FOR DENYING THE PETITION

SUMMARY OF REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari is a contrived and unfounded effort to save the verdict and avoid a new trial on nonexistent procedural grounds by asserting a false conflict of decisions among the circuits in an attempt to induce the Supreme Court to review the Court of

[1] Rule 59(e) applies to amended judgments as well as to an original judgment. *Munden v. Ultra-Alaska Associates*, 849 F.2d 383, 386 (9th Cir. 1988).

Appeals' unreported denial of Petitioner's motion to dismiss appeal. There are no special and important reasons for granting the Petition, and except for a false conflict among the circuits, Petitioner asserts none.

The Court of Appeals' decision on the merits reversed a compensatory award of $390,000 to Petitioner, whose hand was lacerated in a combine accident, and an award of $28 million in punitive damages (as remitted by the District Court from $50 million) because of the erroneous admission of evidence, the submission to the jury of nonexistent legal theories, improper jury instructions, an improper verdict form, improper and prejudicial argument to the jury by Petitioner's counsel, and insufficient evidence to submit a claim for punitive damages to the jury. 6 F.3d 497 (8th Cir. 1993). The Court of Appeals stated it appeared "that the jury indeed sought to create some sort of injury fund or to improperly engage in a social reallocation of resources for the benefit of parties not properly before the court." *Id.* at 513.

As the principal basis for review of the Court of Appeals' Order denying his motion to dismiss appeal, Petitioner asserts that the order conflicts with the decisions of other courts of appeals that "motions referring to Rule 59(e) cannot toll the time for filing a notice of appeal when they are in substance motions under Rule 60(a)." However, this alleged conflict with decisions of other courts of appeals does not exist in fact and is a "false conflict", for several reasons.

First, it incorrectly assumes Petitioner's February 28 Motion to Amend Judgment was "in substance a Rule 60(a) motion" when, in fact, the motion was not a Rule 60(a) motion. Second, it assumes that when it denied the

motion to dismiss appeal the Court of Appeals considered Petitioner's motion to be a Rule 60(a) motion. It did not, or at least it is not apparent that it did. The order denying Petitioner's motion to dismiss appeal did not identify which of the three grounds urged by Deere in resisting the motion to dismiss, if any, it relied upon in denying the motion. Depending upon the actual rationale for the order, which is unknown because the reasons for the order were not set forth, the order may be entirely consistent with the allegedly conflicting decisions cited by Petitioner. In fact, the allegedly conflicting decisions are all easily distinguishable on their facts and no real conflict of decisions exists. In addition, the Court of Appeals' one-sentence order:

> Appellee's motion to dismiss the appeal has been considered by the Court and is hereby denied.

has no precedential value whatever because it is unexplained and unreported. This case does not have any significance which deserves the attention of the Supreme Court and neither of the Questions Presented raise any special or important issues for review by the Supreme Court. The Petition in this Court was also untimely. For all of these reasons the Petition should be denied.

1. The Petition Erroneously Assumes Petitioner's February 28 Motion To Amend Judgment Was In Substance A Rule 60(a) Motion, And That The Court Of Appeals Considered It As Such.

The first and principal Question Presented for review is "whether the time for filing a notice of appeal . . . is tolled by a motion that refers to (Rule) 59(e), but which is

in substance a motion under (Rule) 60(a)." This question is framed by Petitioner as assuming that his February 28 Motion to Amend Judgment was "in substance a motion under Fed. R. Civ. P. 60(a)" to correct a clerical error.[2] If it was not in substance a Rule 60(a) motion, the first Question Presented is not even applicable to *this* case. Before this Court can determine whether the first Question Presented even applies to this case, it would have to engage in a futile factual inquiry to determine whether Petitioner's February 28 Motion to Amend Judgment was in substance a Rule 60(a) motion. Petitioner and Deere do not agree on that issue. The Court of Appeals did not decide that issue even though Petitioner briefed his argument that the motion was a Rule 60(a) motion, and Deere briefed its argument that Petitioner's motion was a Rule 59(e) motion to alter or amend the Second Amended Judgment, or in the alternative, if it was not a Rule 59(e) motion it was in substance a Rule 60(b) motion. The only labels placed on the motion so far are the Rule 59(e) label Petitioner put on the motion when he filed it, and the Rule 59(e) label applied by the District Court when it granted the motion and ordered entry of a new judgment. Thus, the assumption underlying the principal Question Presented assumes a disputed fact that was not decided

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[2] Even Petitioner would agree that if his February 28 Motion to Amend Judgment was in fact a Rule 59(e) motion to alter or amend the Second Amended Judgment, as he labeled it when he filed it, there would be no reason for review because there is no dispute that a timely filed Rule 59(e) motion does toll the time for appeal and Deere's second Notice of Appeal would be undeniably timely.

by the Court of Appeals, and presents an issue that is not even a clear and unambiguous issue in *this* case.

In fact, Petitioner was correct when he labeled his February 28 Motion to Amend Judgment as a Rule 59(e) motion. Motions that call into question the substantive correctness of the judgment and matters properly considered by deliberate choice or in a decision on the merits are Rule 59(e) motions, not Rule 60(a) motions. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 103 L.Ed.2d 146, 109 S.Ct. 987 (1989); *Dalton v. First Interstate Bank of Denver*, 863 F.2d 702, 704 (10th Cir. 1988); *Toscano v. Chandris S.A.*, 934 F.2d 383, 386 (1st Cir. 1991); c.f. *Keith v. Truck Stops Corp. of America*, 909 F.2d 743, 746 (3d Cir. 1990) ("Given the substantial increase in the judgment by the district court's order awarding prejudgment interest, we have no doubt that such a change was substantive and was sufficient to produce a new judgment.").

In addition, to the extent Petitioner's February 28 Motion to Amend Judgment resulted from ambiguity in the February 18 District Court Order and the February 18 Second Amended Judgment, the motion was a Rule 59(e) motion because in ruling upon it the District Court "change[d] matters of substance or resolve[d] a genuine ambiguity in a judgment previously rendered." *FTC v. Minneapolis Honeywell Regulator Co.*, 344 U.S. 206, 211-12, 73 S.Ct. 245, 248-49, 97 L.Ed. 245 (1952); *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986) (Rule 59(e) motion properly brought to correct genuine ambiguity in court's original order). Here, any confusion about what the Second Amended Judgment should have provided arose from the ambiguous and internally inconsistent nature of the District Court's February 18 Order, which stated at one place

that post-judgment interest should be calculated from November 26, 1990, but did not order that judgment be so entered. In fact, the District Court ordered the Clerk of Court to enter a specific judgment that did not include any interest on punitive damages, let alone from November 26, 1990, or any other date. The Clerk of Court followed this Order precisely by striking the third paragraph of the January 9, 1992 Second Amended Judgment and substituting the *specific* language ordered by the District Court. The District Court's April 1 Order not only cleared up the ambiguity in the February 18 Order but it also specified for the first time on what damages interest would be awarded.

Petitioner's attempt to recharacterize his own February 28 Motion to Amend Judgment as a Rule 60(a) motion to correct "clerical mistakes" is misguided, contrived, artificial and wholly without merit. The "very limited" scope of Rule 60(a) deals with the correction of clerical mistakes and applies to errors of transcription, copying or calculation, and may not be used to correct substantive errors. *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 669 (5th Cir. 1986), *cert. den.*, 479 U.S. 930, 93 L.Ed.2d 351, 107 S.Ct. 398 (1986).

Here the Second Amended Judgment followed exactly the District Court's Order regarding entry of judgment. Petitioner's February 28 Motion to Amend Judgment sought an order directing the Clerk of Court to do something that the District Court had not previously directed the Clerk of Court to do. To be correctable under Rule 60(a), a mistake must be one "merely of recitation, of the sort that a Clerk or amanuensis might commit, mechanical in nature." *Dura-wood Treating Co. v. Central Forest Industries, Inc.*, 694 F.2d 112, 114 (5th Cir. 1982). But

even an error such as that is outside the scope of Rule 60(a) if it effects " 'substantial rights of the parties.' " *In re Galiardi*, 745 F.2d 335, 337 (5th Cir. 1984).

Deere believes even Petitioner would agree with the above principles regarding whether a particular motion is a Rule 59(e) motion or a Rule 60(a) motion. Applying these principles, Petitioner's February 28 Motion to Amend Judgment is properly construed as a Rule 59(e) motion in substance and, consequently, Petitioner's first and principal Question Presented does not even apply to this case since this case does not involve a "motion that refers to Fed. R. Civ. P. 59(e), but which is in substance a motion under Fed. R. Civ. P. 60(a)." The Petition to review that Question Presented on writ of certiorari must, therefore, be denied.

Perhaps as important for determining whether review by writ of certiorari is appropriate is that, regardless whether Petitioner's February 28 Motion to Amend Judgment was in fact a Rule 59(e) motion, or a Rule 60(a) motion, the Court of Appeals did not find that it was a Rule 60(a) motion, and did not expressly treat it as such. Consequently it is not known how the Court of Appeals would have ruled on Petitioner's motion to dismiss appeal if it had found the February 28 Motion to Amend Judgment to be a Rule 60(a) motion. Thus, it is not known whether if it had done so a conflict would exist. Therefore, the alleged "conflict" among the circuits, based on the assumption that the motion was in substance a Rule 60(a) motion, is a false conflict.

In order to present an apparent conflict among the circuits, the Petition erroneously assumes that the Court

of Appeals considered the February 28 Motion to Amend Judgment to be a Rule 60(a) motion, and that the order denying the motion to dismiss appeal is in conflict with decisions of other circuits which have held that "motions referring to Rule 59(e) cannot toll the time for filing a Notice of Appeal when they are in substance under Rule 60(a)." Petition, p. 8. However, the Court of Appeals did not find Petitioner's February 28 Motion to Amend Judgment was a Rule 60(a) motion and it is unlikely it considered it as such. In response to Petitioner's motion to dismiss appeal Deere urged that: (1) Petitioner's February 28 Motion to Amend Judgment was a Rule 59(e) motion that tolled the time to appeal until 30 days after ruling thereon, and Deere's second Notice of Appeal was therefore timely, (2) if Petitioner's motion was not a Rule 59(e) motion it was a Rule 60(b) motion which resulted in a new judgment being entered and Deere's second Notice of Appeal filed within 30 days of entry thereof was timely, and (3) even if Petitioner's motion was a Rule 60(a) motion, Deere's appeal should be preserved under the "special circumstances" doctrine.

In ruling on the motion to dismiss appeal the Court of Appeals stated only that "Appellee's motion to dismiss the appeal has been considered by the Court and is hereby denied." Petitioner's App. 1a. Thus, the Court of Appeals' order was not explained even though Deere urged three separate grounds therefor. The most likely reason that the Court of Appeals denied the motion to dismiss is that it found the February 28 Motion to Amend Judgment was a Rule 59(e) motion as Petitioner thought when he filed it and as the District Court expressly stated when it ruled upon it. The Court of Appeals may also

have denied the motion to dismiss appeal because it found the February 28 Motion to Amend Judgment was a Rule 60(b) motion, or because it found this case an appropriate one for application of the "unique circumstances" doctrine. It is very unlikely that it found the motion was a Rule 60(a) motion, but denied the motion to dismiss appeal anyway. It simply is not known why the motion to dismiss appeal was denied and, therefore, it is not known if the decision is in conflict with decisions of other courts that a motion labeled as a Rule 59(e) motion does not toll the time for appeal if it is in substance a Rule 60(a) motion. There is no indication the Court of Appeals thought its order was in conflict with the decisions cited by Petitioner and it is doubtful it did. Thus, the alleged conflict is a false conflict and does not provide an appropriate basis for review on certiorari.

2. The Asserted Conflict With The "Ten-Day" Approach Does Not Exist.

A large part of Petitioner's argument that there is a conflict among the circuit courts of appeals is based upon the statement that:

> "a number of circuits have stated an inclination toward finding *any* post-trial motion, regardless of substance, filed within the ten-day period for filing a Rule 59(e) motion tolls the time for filing a notice of appeal. Eg. *United States v. One Urban Lot*, 882 F.2d 582, 584 (1st Cir. 1989); *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989); *Jackson v. Schoemehl*, 788 F.2d 1296, 1298 (8th Cir. 1986); *Western Indus. v. Newcor Canada, Ltd.*, 709 F.2d 16, 17 (7th Cir. 1983).

Petition, p. 9. Petitioner then asserts that the Court of Appeals' order denying his motion to dismiss appeal is consistent with this "ten-day approach" rather than the "substance of the motion approach" allegedly adopted by the other circuit courts identified at page 8 of the Petition.[3] However, the cases cited as establishing a ten-day approach do not establish a rule that applies to Rule 60(a) motions, do not apply to the facts in this case, and, therefore, do not support review by certiorari in this case.

First, none of the four cases cited by Petitioner involve or even refer to Rule 60(a). Each of the four cases involved the question whether the motion under examination was a Rule 59(e) motion, or a Rule 60*(b)* motion. Three of the cases held that the motion under review was in substance a Rule 59(e) motion, not a Rule 60(b) motion: *Martinez* involved a motion to clarify, alter or amend that involved reconsideration of matters properly encompassed in a decision on the merits; *Western Industries* involved a motion to amend judgment to set off recovery on a counterclaim against recovery on Plaintiff's claim;

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[3] Petitioner cites cases from the Court of Appeals for the Tenth Circuit as examples of both the ten-day approach (*Martinez v. Sullivan*, 874 F.2d 751) and the substance of the motion approach (*St. Paul Fire & Marine Ins. Co.*, 684 F.2d 691). Which side of the alleged conflict does Petitioner assert the Tenth Circuit is on? In fact, these cases were decided upon different facts and are not inconsistent with each other. That Petitioner cites them as examples of Circuit Courts of Appeals that have adopted inconsistent approaches highlights either Petitioner's failure to understand that there really is no conflict among the circuits on this issue, or Petitioner's apparent willingness to cite cases which only superficially support the assertion that there is a conflict among the circuits on this issue.

and *Jackson* involved a motion labeled under Rule 60(b) to set aside a dismissal, and which addressed the correctness of the decision. The other case (*One Urban Lot*) held that a motion to vacate an order striking pleadings, filed more than ten days after the order striking the pleadings, was a Rule 60(b) motion, not a Rule 59(e) motion. Thus, even though three of the cases[4] contain language indicating a preference toward construing motions filed within ten days as made under Rule 59(e) rather than Rule 60*(b)*, in each case that language is *dicta* as to any issue regarding whether any other particular motion is a Rule 60*(a)* motion as opposed to a Rule 59(e) motion. Further, cases stating an "inclination" toward applying a "ten-day approach" are not of sufficient definiteness or clarity to constitute a firm holding of the court of appeals that would adequately define a conflict of decisions among the circuits so as to provide a basis for this Court to resolve such an "inclination toward" a conflict on review by certiorari. Finally, while a "ten-day" rule has been referred to by some courts of appeals, see, e.g., *Harcon Barge Co., Inc. v. D. & G. Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir. 1986) (en banc), those courts have defined the rule to apply only to motions that challenge the substantive correctness of the judgment, and thus, to exclude by definition Rule 60(a) motions which may properly address only "clerical mistakes . . . arising from oversight

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[4] *One Urban Lot* does not even contain language indicating a preference for a ten-day approach, and involves a motion filed more than ten days after the challenged order.

or omission".[5] Thus, rather than being in conflict with any ten-day rule, the "in substance a Rule 60(a) motion" rule is a defined exception thereto. The conflict asserted by Petitioner between the purported "ten-day" approach and the purported "substance of the motion" rule is imaginary and false, and does not support a grant of certiorari in this case.

3. The Decision In This Case Is Not In Conflict With The Cases Cited In The Petition.

The facts in this case relating to the filing of post-judgment motions are in no way analogous to the facts in *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, *Alimenta v. Anheuser-Busch*, *Miller v. Transamerica Press*, or *Offshore Prod. Contractors, Inc. v. Republic Underwriters Insurance Company*, and Petitioner's efforts to construct a "conflict" between those decisions and the Court of Appeals' order in this case are contrived and unsuccessful.

In *St. Paul Fire & Marine*, after entry of judgment the eventual appellant filed an "Objections to Proposed Order" objecting to the form of the judgment because it

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[5] Sitting *en banc* the Fifth Circuit Court of Appeals stated in *Harcon Barge* that:

> [t]he only qualification to this rule is that, even when made within the ten-day period, so important to Rule 59(e), a motion seeking to correct purely clerical errors and mistakes is a Rule 60(a) motion and therefore it does not void a previously filed notice of appeal under Fed. R. Civ. P. 4(a)(4).

784 F.2d at 668.

did not incorporate the essential terms of the court's ruling on motion for summary judgment, even by reference. The objections were denied by the District Court. The Court of Appeals held that:

> St. Paul's "Objections" called into question only the form of the judgment, not its substantial correctness . . . . Motions seeking such immaterial (and, we add, unnecessary) changes in the form of a judgment do not rise to the level of a motion that tolls the time for filing notice of appeal under Rule 4(a)(4).

684 F.2d at 694. These facts are not analogous to this case in which, on consideration of Petitioner's February 28 Motion to Amend Judgment, a new Third Amended Judgment was entered which was materially different from the Second Amended Judgment.

Alimenta involved a post-judgment motion styled as a Rule 59 motion which asked the district court to reconsider its decision that each party bear its own costs. The Court of Appeals correctly held that the motion regarding costs was not a Rule 59 motion. 803 F.2d at 1162. After *Alimenta* the Supreme Court specifically held that a motion addressing court costs does not address the merits and cannot be a Rule 59 motion. *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 108 S.Ct. 1130, 1131, 99 L.Ed.2d 289 (1988) (per curiam). The decision of the Court of Appeals in this case did not involve costs, and is not in conflict with *Alimenta*.

Miller involved a motion by Appellee Transamerica, filed after Miller appealed an order denying his motion to compel a deponent's testimony, to amend the judgment to include a ruling on its request for deposition expenses.

The district court ordered the judgment "amended to reflect that the Court denied (Transamerica's) motion for sanctions." 709 F.2d at 526. The Court of Appeals held the motion was in substance a Rule 60(a) motion even though styled as a Rule 59(e) motion, and Miller's notice of appeal was therefore not premature or void, thereby saving Miller's appeal. 709 F.2d 527. That case, involving an amended judgment that changed nothing of substance, is not analogous to the facts in this case.

In *Offshore Prod. Contractors*, after a notice of appeal was filed, "[f]or reasons not reflected in the record, the court essentially reentered its judgment on August 28, without altering any of the litigants' substantial rights." 910 F.2d at 229. No motion to amend was even involved in that action by the court. The court of appeals held the notice of appeal was effective and that it had jurisdiction. *Id.* There is no conflict between that decision and the Court of Appeals' order in this case.

Thus, there is no real conflict between the cases cited by Petitioner and the Court of Appeals' order denying Petitioner's motion to dismiss appeal.

4. The Second Question Presented Raises No Special Or Important Reasons For Review By Writ Of Certiorari.

Petitioner's second Question Presented addresses whether the "unique circumstances" doctrine should apply in this case. This question does not meet the criteria for grant of a writ of certiorari for several reasons.

First, it is not known whether the Court of Appeals even considered the doctrine, let alone applied it in this case. In resisting Petitioner's motion to dismissal appeal Deere argued as its third alternative basis for denial of the motion that *if* the Court of Appeals found that Petitioner's February 28 Motion to Amend Judgment was not a Rule 59(e) motion, and further, *if* it found the February 28 Motion to Amend Judgment was not a Rule 60(b) motion, and found that the motion was a Rule 60(a) motion that did not toll the time for filing a notice of appeal, then the "unique circumstances" doctrine would apply to preserve Deere's appeal. The unique circumstances doctrine would not apply unless the Court of Appeals found the motion to amend was neither a Rule 59(e) nor a Rule 60(b) motion. Because the Court of Appeals did not set forth the reason or reasons for denying the motion to dismiss appeal, it is unknown, and unlikely, it applied the doctrine in this case.

In addition, even if the Court of Appeals did apply the doctrine in this case, doing so does not raise any issue deserving review by the Supreme Court by writ of certiorari. The order of the Court of Appeals not only does not explain its rationale, it is not reported, and is of no precedential value whatever. It applies only to this case and the parties to this case and has no significance beyond this case. It did not cut off any party's rights but instead permitted consideration of the case by the Court of Appeals on the merits. Consequently there are not "special and important reasons" for granting a writ of certiorari to review Petitioner's second Question Presented, and the Petition should therefore be denied.

5. The Petition Was Not Timely Filed.

Petitioner's Petition in this Court was not timely. The Court of Appeals' initial decision on the merits of Deere's appeal was filed August 13, 1993, however, on August 27, 1993 the Court of Appeals vacated its initial decision and filed a substituted decision. Petitioner's Petition for Writ of Certiorari was filed in this Court on December 21, 1993, well more than 90 days after either the initial decision or the substituted decision, and would be timely only if the time for filing it were extended under Supreme Court Rule 13.4 by a timely petition for rehearing in the Court of Appeals. While Petitioner did file a petition for rehearing with suggestion for rehearing en banc, it was served on August 26, 1993, before the substituted decision was filed, and therefore, related to the initial decision which was vacated, and not to the decision which was substituted on August 27, 1993. Since no separate petition for rehearing was filed after entry of the substituted decision, the time for filing a petition for a Writ of Certiorari began to run on August 27, 1993, and expired on November 26, 1993, twenty-five days before the Petition was filed. Failure to file the Petition timely is a sufficient ground for denial of a Writ of Certiorari.

CONCLUSION

The Petition presented in this case is a contrived and superficial effort to save a judgment for $390,000 in compensatory damages and $28 million in punitive damages which resulted from passion and prejudice, error in the admission of evidence, error in instructing the jury, an

improper verdict form, and improper and prejudicial argument to the jury, which led the jury to believe they could create a fund to compensate persons other than the Petitioner who were more seriously injured in other accidents. The Questions Presented for review make assumptions unsupported by the facts and state a false and nonexisting conflict among the courts of appeals. The order regarding which review is sought is unexplained by the Court of Appeals and is not reported. There are no special or important aspects of this case deserving of review by the Supreme Court. In addition, the Petition was not timely filed. For all of these reasons the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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